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IN THE SUPREME COURT OF THE UNITED STATES

RONALD ROMPILLA,
Petitioner

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AUG 31 2004

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## STATEMENT OF THE CASE

This is a *habeas corpus* action brought pursuant to 28 U.S.C. § 2254 ("§ 2254") by Ronald Rompilla, a Pennsylvania prisoner sentenced to death for first degree murder. On November 1, 1988, a Lehigh County jury found Rompilla guilty of first degree murder in the death of James Scanlon, an Allentown bar owner. Scanlon's body was found in his place of business in the early morning hours of January 14, 1988. He had been stabbed repeatedly and his body had been set on fire while he was still alive and conscious. Scanlon's wallet and approximately $500 to $1000 from the bar were stolen. The jury also convicted Rompilla of burglary, criminal trespass, robbery, theft and receiving stolen property, for which terms of incarceration were imposed.

1. In the penalty phase of the state court trial, the Commonwealth sought to establish three aggravating circumstances: that the murder had been committed while in the perpetration of a felony, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(6)(West. 1998 & Supp. 2003); that the offense was committed by means of torture, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(8)(West 1998 & Supp. 2003); and that Rompilla had a significant history of felony convictions involving the use or threat of violence to the person, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(9)(West 1998 & Supp. 2003). The evidence presented by the Commonwealth to establish the last of those aggravating circumstances, showed that in 1974, Rompilla had broken into the apartment of a female bar owner who lived above her business in order to steal money he believed to be located there. Upon learning that the money was located in the bar's cash register, he forced her to accompany him downstairs where the proceeded to steal the money in the register. He then made the victim return with him to her apartment where he raped her at knifepoint. In the course of this earlier crime, Rompilla also slashed the victim with the knife.

In the sentencing proceeding, Rompilla presented the testimony of five family members—three siblings, his sister-in-law, and Rompilla's 14-year old son—who described their longstanding close and loving relationships with him. Each made emotional pleas for the jury to spare Rompilla's life. Pet. App. 3 at 3-4. Trial counsel had settled on this strategy after efforts to develop other mitigation evidence proved fruitless. In repeated communications they had with Rompilla, and with several of his family members, counsel were informed that there was nothing in his upbringing or lifestyle that would be useful for purposes of presenting evidence in the penalty phase. Counsel stressed to both Rompilla and his family members the importance of developing this evidence. Examinations by three, highly-qualified mental health professionals similarly came up empty in terms of mitigation evidence. One, in fact, had concluded that Rompilla was a sociopath and so advised counsel.

During its deliberations, the sentencing jury interrupted its work three times to pose questions to the trial court. One question asked about the possibility Rompilla would be paroled if sentenced to life imprisonment; another asked for information about his prior sentences, specifically, seeking to know if he had been released based on his behavior; the last wanted to know whether he had received, or could be expected to receive rehabilitation while in prison. In each instance, the trial court explained to the jury that it could not furnish the information and that it had to render a decision based on the law as it was explained to them in its charge. Pet. App. 4 at 26-27.

The jury found all three of the aggravating circumstances advocated by the Commonwealth and two mitigating circumstances under a provision of state law which permitted them to consider any "evidence of mitigation concerning the character and record of the defendant and the circumstances his offense," *see* 42 PA. CONS. STAT. ANN.§ 9711(e)(8): that Rompilla's son had been present for his father's trial and testified on his behalf; and the possibility of rehabilitation. The aggravating circumstances, the jury ultimately found, outweighed the mitigating factors and imposed a sentence of death. On direct appeal, the Pennsylvania Supreme Court affirmed Rompilla's convictions and judgments of sentence. Pet. App. 1 at 3-9.

2. One of the claims Rompilla raised in the course of state collateral review,[1] was that his trial counsel had been ineffective in the penalty phase for failing to investigate and adduce evidence of mitigation. Pet. App. 2 at 4-5. Rompilla had been represented at trial by two attorneys, lead counsel Chief Public Defender Frederick E. Charles, and Maria Dantos, a colleague in the same office. For Ms. Dantos, this case was her first homicide trial and first death penalty case. Mr. Charles was "a veteran attorney with significant criminal experience as a defense attorney" and was "knowledgeable with regard to the law and savvy with regard to trial techniques and strategy." He has experience handling capital cases and in preparing mitigation evidence. In this case, he had the final say on every issue. *See* Pet. App. 4 at 13-19 (which, *inter alia*, summarizes evidence presented in the state collateral review proceedings).

[1] Rompilla sought collateral review of his case pursuant to the Pennsylvania Post Conviction Relief ("PCRA"), 42 PA. CONS. STAT. ANN. § 9541 *et seq.* (West 1998 & Supp. 2003).



Specifically, Rompilla faulted counsel: for failing to interview two of his siblings, and for not more completely interviewing other siblings, which, he said, would have elicited information about the adverse home situation in which he was raised, its effect on him and problems he had with alcohol; for failing to obtain various records and for not providing the same to experts retained on his behalf and for failing to adequately communicate with them. The PCRA conducted an evidentiary hearing, at which trial counsel both testified. They explained that, from the earliest stages of this case, they were concerned with the development of mitigation evidence and worked toward gathering the same. Based on past experience, they engaged Rompilla and numerous family members in discussions on this subject seeking to learn from them the possible areas on which they could most profitably focus their efforts and the resources available to them. Counsel explained that he did not generally canvass for Rompilla's records because in his past experience it was not necessarily the best way of locating useful material; that often times it produced information too remote in time to be of much value. Rather, as an initial step, he made it a practice to approach those who knew a defendant the best in order to pinpoint areas to be further explored. In their communications with Rompilla and his family, counsel stressed the importance of marshalling this information. They were constantly told by all concerned that there was nothing in his background that would help Rompilla's cause. *Id.* at 13-19.

Counsel also explained that, independently of those efforts, they had Rompilla evaluated by three highly-qualified mental health professionals, a psychologist and two psychiatrists, and that he relied on their expertise. The uncontradicted evidence reflected that trial counsel furnished those professionals with whatever they needed to evaluate

Rompilla. None asked for any of his records. Moreover, counsel indicated that had they said that they needed them, he would have sought and obtained them. None reported anything useful to Rompilla's case. In the wake of this, and a question from the jury about accomplice liability during its deliberations in the guilt phase, counsel decided that the best strategy was to make a plea for mercy and to try to capitalize on any residual doubt members of the jury might have. The PCRA court ruled, based on the record, that trial counsel was not ineffective. *Id.*; *see also* Pet. App. 2 at 4-5.

Rompilla also contended that the trial court had erred in failing to give an instruction to the jury that, in Pennsylvania, a term of life imprisonment carries with it no possibility of release on parole, in other words, that "life means life." He maintained that the Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), required this because, in his view, the prosecution had put his future dangerousness at issue when it sought to establish the "history of serious felonies" aggravating circumstance. The PCRA court rejected this claim as well. In his subsequent appeal to the Pennsylvania Supreme Court, the ruling of the PCRA court was affirmed in all respects.

3. The district court that considered Rompilla's § 2254 petition, which included his claims of counsel's ineffectiveness in the penalty phase and his *Simmons* claim, ruled without conducting an evidentiary hearing. The court granted *habeas* relief on the former claim, vacating Rompilla's sentence of death and awarding him a new penalty phase , and denied relief on the latter. While the district court acknowledged that its review was affected by changes to federal *habeas* law made by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, *see* Pet. App. 3 at 2-3, ultimately, it was guided by its own, independent evaluation of counsel's performance. *Id.* at 3-10.



Though the district court said that it was "a very close call in this case because trial counsel performed so admirably according to [its] review of the record," it nevertheless thought counsel should have taken other steps to discern Rompilla's background. *Id.* at 10. The district court held that the state court ruling which had reached the opposite conclusion was unreasonable. In its discussion of this claim, the district court identified what it saw as two important deficiencies in the decisions of the Pennsylvania courts: "no in depth analysis of what the duty to investigate consists of in a case of this nature; and . . . a lack of discussion of alcoholism pertaining to . . . [Rompilla]." *Id.* at 7.

With respect to Rompilla's *Simmons* claim, the district court determined that the Pennsylvania Supreme Court's ruling afforded no basis for *habeas* relief. After parsing the portions of the trial record which contained the prosecutor's closing argument in the penalty phase, the district court agreed with the state court's conclusion that he did not put Rompilla's future dangerousness at issue. Based on that record, and the narrow scope of review under AEDPA, the district court said that state court ruling on Rompilla's application for collateral relief "was not an unreasonable application of federal law." *Id.* at 11-12.

4. The Commonwealth appealed the district court's ruling on Rompilla's ineffectiveness claim to the Third Circuit; Rompilla cross-appealed on the *Simmons* issue.[2] Finding that the district court had improperly analyzed the ineffectiveness claim, the Court of Appeals reversed its ruling granting Rompilla relief and reinstated his death sentence. Pet. App. 4 at 6-20. The district court's evaluation of the state courts' rulings

[2] Rompilla was also permitted to appeal the district court's ruling on his claim that the trial court erred in instructing the jury on accomplice liability. *See* Pet. App. 4 at 20-23. His petition to this Court does not seek review of the Court of Appeals' ruling on that issue.

on Rompilla's ineffectiveness claim failed to give proper effect to the provisions of § 2254(d)(1). The state court decisions could not be disparaged, let alone labeled "unreasonable," because they failed to contain discussion of the subjects cited by the district court. This Court's jurisprudence has made it clear that a failure to refer to specific authority, or to discuss the same in a decision, is not part of the calculus in post-AEDPA *habeas* review. Rather, that the proper approach is to assess whether the state court's ruling is "contrary" to this Court's controlling precedent, as that term has been defined in its *habeas* jurisprudence, or constitutes an objectively unreasonable application of the controlling decisional law. Though a federal court may disagree with a state court's conclusion it has no authority to substitute its assessment if the state court's ruling falls within the range of objectively reasonable dispositions. Applying these principles in the specific context of Rompilla's case, the Third Circuit concluded, warranted no grant of *habeas* relief as to his ineffectiveness claim.

The Court of Appeals upheld the district court's disposition of Rompilla's *Simmons* claim, agreeing that its review of the state court ruling on this issue was sound. The district court had viewed this claim from the proper legal and temporal perspectives and correctly concluded that the state court's ruling was neither contrary to, nor an unreasonable application of, the then-existing controlling precedent of this Court. *Id.* at 23-30.



## REASONS FOR DENYING THE WRIT

**This Case Presents No Important or Wide Reaching Issue of Law; Rather, the Decision of the Court of Appeals Properly Applied Well-Settled Legal Principles to the Specific Facts of This Case.**

The Third Circuit's ruling in this case broke no new legal ground nor deviated from the principles this Court has announced with respect both to federal *habeas* review of state court decisions and the particular substantive law governing the petitioner's claims. To the contrary, the Court of Appeals faithfully applied this Court's teachings in analyzing petitioner's claims that, in the penalty aspect of his state court trial, counsel was ineffective and that the jury was given inadequate instruction. Further review of this case is therefore unwarranted.

1. **The Court of Appeals Correctly Reversed the District Court's Ruling Awarding Relief to Petitioner as to His Ineffectiveness Claim Because the District Court Did Not Take Proper Measure of the State Court's Decision Under § 2254(d).**

Because the Pennsylvania courts had adjudicated Rompilla's claim that trial counsel were ineffective in the penalty phase on the merits, the Court of Appeals properly determined that the nature and scope of federal habeas review was not *de novo*, but whether the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court] . . . ." Pet. App. 4 at 5. It stressed that this standard does not permit a federal court to substitute its independent assessment of claims for that of the state court. *Id.* at 6. In this instance, as the Court of Appeals observed, the district court's ruling on this claim had not only expressed its disagreement with the decisions reached by the state courts, but also found them to be "unreasonable." *Id.* at 10. In so ruling, the district court had assigned significance to the

failure of the state courts to include in their decisions: any in-depth analysis of trial counsel's duty to investigate; any reference to or discussion of ABA Standards for Criminal Justice; and any discussion of alcoholism. *Id.*

The Court of Appeals quite correctly determined that the district court was not justified in discrediting the state court rulings for these perceived deficiencies in explication. *See Early v. Packer*, 537 U.S. 3, 8 (2002)(*per curiam*)(proper application of the provisions of § 2254(d)(1) "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them")(emphasis in original). *Accord Weeks v. Angelone*, 528 U.S. 225 (2000).

Likewise it properly rejected Rompilla's contentions that the state courts did not adjudicate the merits of Rompilla's ineffectiveness claim, making their rulings subject to the scrutiny mandated by § 2254(d). *See* Pet. App. 4 at 11-13 (where the court noted that the plain content of the state court decisions would lend themselves to no other interpretation).

As its opinion reflects, in examining the state court rulings pursuant to § 2254(d), the Third Circuit undertook a painstaking and extremely detailed review of the state court record. *Id.* at 6-20. In determining that the state court's disposition of this claim was neither contrary to, nor an unreasonable application of this Court's precedent, the Court of Appeals did precisely, what it was required to do. It first looked to see whether the state courts had issued a decision that "contradict[ed] the governing law set forth in [this Court's] cases" or one that "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] a [different]



result . . . ." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). *See* Pet. App. 4 at 13. Its conclusion that the decision of the Pennsylvania courts was not contrary to the controlling decisions of this Court was sound. The Court of Appeals properly rejected Rompilla's contention that the Pennsylvania courts employed a different standard in deciding his ineffectiveness claim. *Id.* at 11-13. That argument, the Third Circuit explained was ill-conceived for two reasons. First, Pennsylvania law has repeatedly emphasized that the standard contained in state cases dealing with ineffectiveness claims and that in *Strickland v. Washington*, 466 U.S. 668 (1984), are one and the same, notwithstanding the fact that, to facilitate the examination of claims, Pennsylvania cases break down the review required under *Strickland*'s "performance" prong into two steps. *Id.* at p. 12 (citing *Commonwealth v. Pierce*, 515 Pa. 153 (1987)(which makes this explicit). This sub-division of the review of counsel's performance, as the Court of Appeals pointed out, is "essentially stylistic," not substantive. *Id.* Second, it is clear from the decisions of the state courts in this case, that they actually employed the analysis *Strickland* mandates. *Id.* at 11-13.

Equally well-grounded was the Court of Appeals' conclusion that Rompilla was entitled to no relief under § 2254(d)'s "unreasonable application" clause. The court carefully heeded this Court's instructions in *Strickland* that judicial review of an attorney's performance must be highly deferential and that the reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Its lengthy and thorough discussion of trial counsels' extensive efforts to obtain and marshal mitigation illustrates

that the conclusion reached by the state courts on Rompilla's ineffectiveness claim was not "unreasonable."

What is abundantly clear from the court's discussion in this regard is that the factual record showed, without contradiction, that counsel, from the earliest moments of this case sought to gather information about and evidence of mitigation. Contrary to the distorted picture the Rompilla's petition to this Court paints, these efforts were not careless, disorganized, unfocused or inexperienced. Pet. App. 4 at 13-20. The uncontradicted evidence in the state record showed that counsel conceived and carried out a responsible plan to investigate and gather information—a plan formulated based on past experience which sought to maximize the resources available. As part of that plan they engaged in frequent contacts with numerous close family members in order to learn what, if anything, in Rompilla's past might be fertile ground for mitigation evidence and had Rompilla evaluated by several well-qualified mental health professionals for the same purpose. *Id.*

This case does not involve the sort of situation the Court encountered in *Wiggins v. Smith*, 539 U.S. 510 (2003), or anything close to it and the Court of Appeals rightly rejected Rompilla's arguments that it did, underscoring important disparities between the cases:

> There are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys. Wiggins's attorneys were presented with leads that 'any reasonably competent attorney' would have realized were promising. Rompilla's attorneys had no comparable leads. Wiggins described his childhood as 'disgusting'; Rompilla insisted that his was 'normal.' In *Wiggins*, post conviction interviews with Wiggins himself and with members of his family produced evidence of severe abuse. In the present case, Rompilla's attorneys interviewed their client and numerous family members in detail before the penalty proceeding but discovered no mitigating evidence. Wiggins's attorneys 'uncovered no evidence in their



> investigation to suggest that . . . further investigation would have been fruitless.' Rompilla's family background would not have been productive. Not only did Rompilla's attorneys probe their client for mitigating evidence, but they interviewed numerous members of his family, including siblings who bracketed him in age. At least one of these siblings, . . . later revealed that he knew about the conditions in the home on which Rompilla now relies, but he never provided that information t trial counsel, and although he now claims that trial counsel never asked him about any period of time other than the months immediately preceding the murder, the PCRA court found that this testimony was not believable.
>
> In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, Wiggins is critically different from the present case.

Pet. App. 4 at 18-19 (internal citations omitted).

In light of the factual record, the Court of Appeals made no error in concluding that the state courts had not unreasonably applied this Court's controlling precedents governing ineffectiveness claims. Its ruling on the same involved no novel or significant development in the law and certainly is of no widespread effect. There is no creditable basis therefore for further review of this claim.

**2. Nor Should The Court Review Rompilla's *Simmons* Claim; the Court of Appeals Correctly Determined That He Was Not Entitled to *Habeas* Relief.**

With respect to Rompilla's claim that the trial court was obliged by *Simmons* to give a "life means life" instruction, the decision by the Court of Appeals affirming the district court's denial of relief, similarly reflects no error. The Court of Appeals, like the district court, conducted its review of this claim pursuant to the provisions of § 2254(d), since the state courts had adjudicated the claim on the merits. Pet. App. 4 at 23-30. Importantly, both of the federal courts appreciated that, in deciding whether the state

court ruling was contrary to or an unreasonable application of controlling precedent of this Court, they were obliged to look at the precedent existing at the time of the state court rulings and to make the required assessments in that temporal context. Pet. App. 4 at 26 (quoting *Williams*, *supra*). At the time of the state court rulings on this issue, the controlling precedent at that time could be found in the Court's decision in *Simmons*, *supra*, and the state court decision expressly refers to and is guided by that ruling. Pet. App. 2 at 9. After finding that no issue of the defendant's future dangerousness had been made, the Pennsylvania courts concluded that no "life means life" instruction was required by *Simmons*. *Id.*

The Court of Appeals' careful review of *Simmons* explained that it could be understood to hold that a "life means life" instruction need only be given in situations where the prosecution has put into issue the defendant's future dangerousness. Pet. App. 4 at 23-26. *Simmons* did not speak to circumstances where the prosecution has not actively raised that issue, nor other situations, such as that presented in this case, where the jury of its own accord asks questions about the possibility of parole.[3] *Simmons* likewise did not hold, or even suggest, that a statutory aggravating circumstance focusing

[3] The Commonwealth takes issue with Rompilla's repeated and purely subjective characterization of the sentencing jury's questions as signaling concerns on its part about his future dangerousness. Certainly, that is one possible reason it sought the information it did. It is, however, equally possible that its questions were motivated by other concerns. For example, the jury may have wanted to be sure that "life imprisonment" in Pennsylvania would mean that the defendant would serve a lengthy term of incarceration, something, which in its view would be punishment commensurate with the horrible crime he had committed. It may have been seeking confirmation that he could not be paroled after just a few years in prison.



solely on a defendant's past criminal history, by itself, served to put a defendant's future dangerousness at issue.[4]

In view of this, the Court of Appeals was indisputably correct in holding that the state court decisions here were not contrary to the then-existing, controlling precedent of this Court. Pet. App. 4 at 27-28. Plainly, as the court's survey of the extant precedent on this point shows that, in ruling as they did, the Pennsylvania courts had neither "contradict[ed] the governing law set forth in [this Court's] cases" nor "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] a [different] result . . . ." *Williams*, *supra*, 529 U.S. at 405-06. *See id.*

Nor, as the Court of Appeals' comprehensive discussion reflects, could it fairly be said that the state court's decision unreasonably applied *Simmons*. Pet. App. 4 at 28-30. As it pointed out, the prosecutor's remarks which Rompilla contends raised the specter of his future dangerousness, (*e.g.*, the prosecutor's use of the word "frightening" in comparing the crime in this case with an earlier crime Rompilla had committed), in fact did not have that effect when read in context. When the words and phrases he has selectively excised and cobbled together in aid of his argument are actually viewed in this manner, it soon becomes clear that the prosecutor's statements were responsive to

[4] As its opinion reflects, at the time the Pennsylvania Supreme Court ruled on Rompilla's *Simmons* claim, its jurisprudence included rulings that the "significant history of serious felonies" aggravating circumstance., *see* PA. CONS. STAT. ANN. § 9711(d)(9), did not put a capital defendant's future dangerousness at issue. This aggravating circumstance, the court had held, was retrospective—not prospective—in character. *See* Pet. App. 2 at 9. Simply put, this provision of state law helps a sentencing jury weigh whether there have been prior instances in which defendant has repeatedly displayed serious disregard for society's laws or whether the crimes for which a sentence is to be imposed is a singular aberration in an otherwise law-abiding life.

arguments of residual doubt that Rompilla made to the jury and were not an invitation to the jury to impose a death sentence as 'a response of society to someone who is a threat," or as "an act of self-defense" as was the case in *Simmons Id.* at 28-29 (where the court explained that use of the word "frightening" in this situation equated with "astounding"). The Court of Appeals correctly determined that, based on their respective trial records, there was no parity between this case and *Simmons*.

In turn taking up and rejecting each of the reasons Rompilla advanced as part of his argument that he was entitled to relief under this clause of § 2254(d)(1), the court surveyed the controlling precedent of this Court as it existed *at the time the state courts ruled on the issue* and evaluated whether the decision reached by the state courts was unreasonable given how the law was defined *at that time*. In his petition to this Court, as he did in the court below, Rompilla blends a highly subjective interpretation of what occurred in this case with post-*Simmons* jurisprudence, including the Court's decisions in *Shafer v. South Carolina*, 532 U.S. 36 (2001) and *Kelly v. South Carolina*, 534 U.S. 246 (2002)--rulings issued years *after* the state court decisions in this case--in faulting the failure to grant *habeas* relief on this claim. This attempt at retrofitting the circumstances in which the state court ruled is ill-conceived and contrary to the clear admonition in *Williams* about focusing on the proper point in time when conducting review under § 2254(d)(1). The Court of Appeals did not stray from the proper path in its evaluation of this claim either. Its ruling does not give rise to any legal issue worthy of further review.



## CONCLUSION

The Court should deny the petition.

**Respectfully submitted,**

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